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Hon. Bob Goodlatte
Chairman, House Judiciary Committee
Hon. John Conyers, Jr.
Ranking Member, House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

Chairman Goodlatte and Ranking Member Conyers:

Thank you for the opportunity to provide the U.S. House Judiciary Committee written testimony for its "Exploring Alternative Solutions on the Internet Sales Tax Issue" hearing. I hope to express some of my overall concerns with federal legislation on state sales tax issues.

Since early 2013 when I was first elected to office, I have followed the progress of the "Markplace Fairness Act" (S. 336/S.743/H.R.684). The legal concerns I saw in the Act led me to form a multi-state, bi-partisan coalition of attorneys general who share those same concerns. To date, General Rosenblum (D-Oregon), General Geraghty (R-Alaska) and General Foster (D-New Hampshire) have joined this coalition. Last summer, this group sent a letter to every member of the U.S. House detailing the constitutional problems in the bill. This written testimony summarizes the contents of that letter.

By authorizing the enforcement of state sales tax laws that require remote sales retailers to collect and remit tax proceeds to out-of-state taxing authorities that the retailer has not established "minimum contacts" with, the Act violates the Due Process Clause. Although Congress can authorize the enforcement of state legislation that burdens interstate commerce, Congress may not authorize the enforcement of state laws that violate the Due Process Clause. So, although this Act may clear the Commerce Clause hurdle, state taxing authorities wishing to collect sales taxes from out-of-state businesses will still face a Due Process Clause hurdle.

The Due Process Clause "demands that there be some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax, as well as a

rational relationship between the tax and the values connected with the taxing State.”¹ For purposes of evaluating whether this type of law violates the Due Process Clause, the relevant inquiry is not whether the remote sales business has a “physical presence” in the taxing state, but whether the business has adequate contacts with the taxing state “such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.”²

Under this standard, an out-of-state retailer that purposefully avails itself of the benefits of an economic market in the forum state by engaging in continuous and widespread solicitation of business will have established minimum contacts with the forum state sufficient to satisfy Due Process. This Act, however, does not limit the enforcement of state sales taxes to remote sales retailers that have purposefully availed itself of benefits in the taxing forum. Instead, it will authorize enforcement of state sales tax laws that require any remote sales retailer located within our borders with a website and a single customer in a distant location to collect and remit taxes from that transaction. Under the Act, it makes no difference whether or not the retailer targeted the taxing forum or had a physical presence there. As a result, any state’s efforts to enforce the collection of sales tax proceeds from remote sales retailers with little or no contact with the taxing authority will remain constitutionally suspect. This uncertainty will trigger years of costly litigation for state taxing authorities and remote sales retailers as the courts define the contours of what constitutes adequate contact to satisfy Due Process.

Aside from the costly Due Process litigation this Act will trigger, requiring small, brick-and-click remote sales retailers to collect and remit sales taxes to upwards of 9,600 taxing jurisdictions will be a costly burden on our small businesses making it more difficult for them to compete in the market. Given the clear legal and economic pitfalls the Act presents, I strongly urge you to oppose it.

In terms of alternatives to the Act, I would continue to urge caution. I understand many states are struggling to collect revenues they feel are due to their coffers from internet transactions, but some states have also chosen not to enact general sales taxes at all. A federal fix for some states’ revenue problems becomes a new problem for states like Montana that have consistently rejected a general sales tax. Burdening small business owners in Montana with the tax collection duties for thousands of other taxing jurisdictions is a federal mandate that does nothing to create good-paying jobs and strengthen the economy. Not to mention,

¹ *MeadWestvaco Corp. v. Illinois Dep’t of Revenue*, 128 S Ct. 1498, 1505 (2008) (internal quotations omitted).

² *Quill v. North Dakota*, 504 U.S. 298 (1992) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

many likely proposed alternatives to the state sales tax level will continue to run into the Due Process Clause hurdles I have detailed earlier when approached from a one-size-fits-all federal solution.

Furthermore, it is incongruous with principles of good government and fiscal conservatism to encourage the tax-and-spend propensities of many states and localities, particularly those that are in debt, by allowing them to tax non-residents over the internet. Congress should refuse to be the tax “pusher” for these tax-and-spend “junkies.” As one of the few states with both a state constitution balanced-budget requirement, and a balanced budget, Montana objects to Congress placing any further burdens on our job creators and hard-working citizens.

I urge your committee to reject the so-called “Marketplace Fairness Act” and the idea of a federal fix on the state sales tax issue. Montana’s job creators are trying to figure out how to put more people to work, enhance markets and create profit – not solve the revenue problems of other states. Thank you for your consideration of this testimony.

Sincerely,

A handwritten signature in blue ink, appearing to read 'T. Fox', with a long horizontal line extending to the left.

Timothy C. Fox
Attorney General of Montana